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IN THE SUPREME COURT OF THE UNITED STATES

October 1943 Term

No. 111

FRED PINE (the appellant below),

Petitioner,

vs.

UNITED STATES OF AMERICA (the appellee below),

Respondent.

Petition for Writ of Certiorari to United States Circuit Court of Appeals for Fifth Circuit and Supporting Brief

JAMES M. CARSON (Congress Building, Miami, Florida) and VINCENT C. GIBLIN (Ingraham Building, Miami, Florida), Counsel for Petitioner.

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To--THE HONORABLE HARLAN F. STONE, CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, Fred Pine, respectfully prays that the Court issue a writ of certiorari, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding it to certify and to transmit to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals in that certain cause, numbered 10336, wherein Fred Pine (the petitioner here) was appellant and the United States of America (the respondent here) was appellee, so that the said cause may be reviewed and determined by this Court, as provided for by the governing statutes and rules, and so that the judgment of the said Circuit Court of Appeals in the said cause may be reversed by this Court.

SUMMARY STATEMENT OF THE MATTERS INVOLVED.

The petitioner, Fred Pine (an attorney of the City of Miami, Florida), was charged in an indictment (r. 1-4) returned in the District Court of the United States for the Southern District of Florida with having conspired with others "to unlawfully, wilfully, knowingly and feloniously transport and cause to be transported and aid and assist in obtaining transportation for and transporting in interstate commerce from Chattanooga, Tennessee, Atlanta, Georgia, and divers other places to the grand jurors unknown, to Dade County, State of Florida, certain women and girls, to-wit, Mary Agnes

McCullar, Frances Pauline McCullar, Billie Johnson, Ann Bennett, Jessie Asher, Betty Martin Tinker and Frances Jobe, sometimes known as Frances Hollborn, and divers and sundry other women and girls whose **names** are to the grand jurors unknown, with the intent and for the purpose of enticing, inducing and compelling **said** women and girls to enter into a life or condition of debauchery, **that is to say,** for the purpose of employing them to work for the Palm Lake Development, Inc., a corporation owning and operating the La Paloma Club, amid such surroundings and under such conditions as **tended** to induce **the women and girls aforesaid** and other women and girls to the grand jurors unknown, to give themselves up to a condition, form and type of debauchery that **would naturally lead** them to a course of sexual immorality, in violation of the provisions of the Act of June 25, 1910 (Section 398, Title 18, U. S. C. A.)."

The indictment was based on the opinion and decision of this Court in the case of Louis Athanasaw and Mitchell Sampson v. United States, 227 U. S. 326, 57 L. ed. 528, 33 S. C. 285.

In a motion (r. 5-7) to quash and in a demurrer (r. 13-15) the petitioner attacked the indictment on the grounds (among others) that (a) it did not appear by or from the facts alleged that he was guilty of any violation of any statute or law of the United States; that (b) the indictment is duplicitous; and that (c) his prosecution under the indictment would be violative of his right, guaranteed to him by Article VI of the Amendments to the Constitution of the United States, "to be informed of the nature and cause of the accusation" against him, and would subject him to being twice put in jeopardy for

the same offense in violation of Article V of the Amendments to the Constitution of the United States.

The motion to quash was denied (r. 13-15) and the demurrer was overruled (r. 13-15).

The petitioner moved (r. 7-9) for the entry of an order requiring the Government to file a bill of particulars in and by which "the Government shall specify, with reasonable certainty and definiteness, the names of any women or girls, other than Mary Agnes McCullar, Frances Pauline McCullar, Billie Johnson, Ann Bennett, Jessie Asher, Betty Martin Tinker and Frances Jobe [the women or girls whose names were known to the grand jurors and whose names were set forth in the indictment], to effect the illegal transportation of whom the Government expects to prove the defendant conspired."

The motion was granted (r. 13-15) and the Government was required to specify (in a bill of particulars) "the name or names of any woman or women, girl or girls, other than Mary Agnes McCullar, Frances Pauline McCullar, Billie Johnson, Ann Bennett, Jessie Asher, Betty Martin Tinker and Frances Jobe, to effect the illegal transportation of whom the Government expects (at the trial) to prove the defendant conspired."

In its bill of particulars (r. 15-22) the Government specified the name of Rachel Louise Clark (an alleged co-conspirator and accomplice) as the name of the only woman or girl (other than the women or girls whose names were known to the grand jurors and whose names were set forth in the indictment) to effect the

illegal transportation of whom the Government expected to prove the defendant conspired.

The petitioner entered a plea of not guilty (r. 22) to the indictment; and a trial by jury (r. 22) ensued.

The petitioner entered into the trial to defend himself against the charge that he had conspired with others to effect the illegal transportation in interstate commerce of specific persons (the women and girls named in the indictment and in the bill of particulars).

The transcript of the evidence (r. 33-653) adduced at the trial is voluminous. There is no need, however, for an exhaustive review and analysis of the proofs. For the purposes of this petition a statement of some of the matters shown by such proofs and a brief summarization of all of the evidence will suffice.

The Government relied solely on circumstantial evidence. Despite the fact that Evelyn Clark Youst and Rachel Louise Clark (named in the indictment as two of the petitioner's co-conspirators and accomplices) testified as witnesses for the Government, there was no direct or positive testimony or proof that the petitioner had entered into any conspiracy to effect the transportation in interstate commerce of any women or girls.

Al Youst (named in the indictment as another of the petitioner's co-conspirators and accomplices), prior to the incorporation of Palm Lake Development, Inc. (the corporation named in the indictment), had owned and operated for several years the La Paloma Club, a night club near the City of Miami, Florida. Because of

the club's proximity to a school and because of his having been convicted of a felony, Youst had been unable to procure a license for the sale of liquor at the club. Several times he had been arrested and charged with having illegally sold liquor at the club. He decided, because of the legal impediments to his procurement of a liquor license, to change the location of the club and to obtain a license through the instrumentality of a corporation in which he should have no apparent stock interest. He purchased (at a cost approximating $5,000) a tract of land, the legal title to which was vested in his sister, Mrs. Hazel McNichols, for the purpose of concealing the true ownership of the property. He caused to be constructed on the land a club building and a number of cottages. The entire cost of construction (a sum in excess of $17,000) was paid by Youst. He employed the petitioner to render the necessary legal services incident to the procurement of a corporate charter and to the organization of the corporation. After the corporation was formed, seventeen of its twenty shares of capital stock were issued to Mrs. McNichols and her husband, James McNichols, in consideration of the transfer to the corporation of the title to the club property; two shares were issued to the petitioner; and the remaining share was issued to Bert Reeves, a carpenter who had supervised the construction of the buildings erected on the club property. All of the officers and directors of the corporation were "dummies." Initially Holmes Allen, an employee, was made president; Bert Reeves, the carpenter, was made vice-president; and the petitioner was made secretary and treasurer. Later, when Allen severed his connection with the club, Reeves was made president; and Frank Talley, the orchestra leader, was made vice-president. The corporation and its business and affairs

and its finances were dominated and controlled by Youst. No one, other than he, contributed any money or property to the corporation's capital or advanced to it any funds. In short, the corporation constituted a "front" behind which Youst operated and managed at a different location the same business which he had formerly operated and managed individually.

As secretary of the corporation, the petitioner's only function was to draft corporate minutes reflecting Youst's wishes. No formal stockholders' or directors' meetings were ever held. As treasurer of the corporation, the petitioner's only function was to sign corporate checks, which, however, were not valid or negotiable bank drafts unless and until they were countersigned by Youst, as "manager." The petitioner's custom was to sign (in his law office, at home or at the club) a large number of checks in blank for Youst's future use. The petitioner exercised no control over the corporate bank account and had no knowledge or information at any time as to its status.

The La Paloma Club was opened for operation at its new location on New Year's eve of 1938. A license for the sale of liquor at the club had been applied for and obtained by Allen individually. The license fee (of $1,500) was advanced by Youst. Later, after the corporation had been organized, an application was made to the county commissioners of Dade County for their approval of a transfer of the license from Allen to the corporation. The Government adduced testimony which concededly shows that the commissioners were induced to approve the transfer by the petitioner's deceptive representation that Youst had and was to have no connection with the

club. There is also in the record evidence that the pretense that Youst was not the owner of the club was continued after the transfer of the liquor license for the purpose of deceiving the law enforcement authorities and the public generally in order to prevent the revocation of the license.

It must be admitted that the atmosphere which prevailed at the club was extremely immoral. Female entertainers danced almost nude and engaged in dances and other activities which were lewd and sexually suggestive in the extreme. The two fundamental factors which contribute to the successful operation of most night clubs—liquor and sex—were not disguised in tinsel or glamor at the La Paloma Club. Its crude and bold appeal was to patrons who like their liquor and their sex "raw."

The floor show and the entertainment at the club were managed by Youst and Evelyn Clark (his mistress whom he later married). They employed and discharged the hostesses, the entertainers, the bartenders and all of the other employees of the club (r. 283). The petitioner was not even consulted as to the employment or the discharge of any of the employees (r. 283).

Shortly after the club resumed operation at the new location Evelyn Clark induced her younger sister, Rachel Louise Clark, who was living with their mother in Chattanooga, Tennessee, to come to Miami and to accept employment at the club. Her transportation expenses were paid out of the club's funds. The petitioner, however, was totally ignorant of any plan or purpose to effect her transportation and of her coming to Miami (r. 258). Not

knowing of any such plan or purpose he, of course, could not have been a party to it.

In March, 1939 Evelyn Clark was visiting her mother in Chattanooga. During the visit she met Betty Martin Tinker and induced her to come to Miami and to accept employment at the club. Her transportation expenses were paid out of the club's funds. But there was no evidence that the petitioner knew of the plan or purpose to effect the transportation of Betty Martin Tinker or of her coming to Miami (r. 276); and, therefore, could not have been a party to any such plan or purpose.

In June, 1939 Carroll King, named in the indictment as another of the petitioner's co-conspirators and accomplices, and Rachel Louise Clark left Miami in King's automobile and drove to Atlanta, Georgia. She proceeded alone to Chattanooga to visit her mother. Before they left Miami Youst instructed them to publish in Atlanta and Chattanooga newspapers advertisements designed to attract girls as prospective employees. There was no evidence, however, that the petitioner had any knowledge of the contemplated journey of Carroll King and Rachel Louise Clark, of their departure, of the instructions given them by Youst, or of their activities during their absence (r. 267-274). They procured five women or girls (Mary Agnes McCullar, Frances Pauline McCullar, Billie Johnson, Ann Bennett and Jessie Asher) and King transported them to Miami in his automobile and they accepted employment as hostesses and entertainers at the club. The expenses of their transportation were paid out of the club's funds. There was no evidence, however, that the petitioner knew of the plan or purpose to effect their transportation or of their coming to Miami (r. 264-274)

and, consequently, he was not a party to any such plan or purpose.

During another visit of Evelyn Clark to Chattanooga she endeavored to persuade Frances Jobe to accept employment at the club, but the latter evidenced no interest in such employment. The petitioner knew nothing of the conversation in Chattanooga between Evelyn Clark and Frances Jobe and was never told about it (r. 283). Later Frances Jobe came to Miami at her own expense. No one connected with the club knew of her coming (r. 282). On her arrival she went to the club and solicited and obtained employment.

The only other evidence as to any plan or purpose to induce women or girls to come from other states and to accept employment at the club was proof that Youst caused an advertisement to be published in the Billboard (a theatrical magazine); but there was no evidence that the defendant knew, before the introduction of such evidence at the trial, that Youst contemplated the publishing of the advertisement or that it was published.

The Government relied on a number of circumstances in its effort to prove the petitioner's guilt of the offense charged in the indictment. There is in the record evidence that he performed the legal services incident to the incorporation and organization of Palm Lake Development, Inc.; that he became a stockholder, director and officer of the corporation; that as treasurer of the corporation he signed its checks (in blank); that he deceived the county commissioners in the procurement of their approval of the transfer to the corporation of the liquor license; that he actively participated in the effort to con-

ceal from the law enforcement officers and the public the true ownership of the La Paloma Club; that in such effort he openly professed to be, and represented himself as, the owner or one of the owners of the club; that he frequented the club; that he witnessed the entertainment provided by the club; that he drank liquor at the club; that he engaged in obscene conversations at the club with the hostesses and entertainers; that on one occasion (incredible as the extremely prejudicial testimony is) he engaged, in the presence of three eye witnesses (all of whom were Government witnesses, but none of whom corroborated the fantastic story), in an illicit and perverted act of sexual intercourse with one of the entertainers; that on one occasion he expressed the desire and the intention to make Rachel Louise Clark his mistress (although there was no evidence that he ever attempted to effectuate such an intention); and that by his legal services and advice he enabled Youst to continue the operation of the club despite the efforts of local law enforcement officers to close it as a public nuisance. The petitioner's principal function in connection with the club was as attorney for Youst and the corporation. He represented Youst and his employees in no less than thirty criminal cases. He was counsel for the corporation in at least two civil suits (one of which was an injunction suit brought by the state attorney and the county solicitor in an effort to effect the closing of the club as a public nuisance).

The only financial benefit which the petitioner enjoyed as a result of the club's operation was the payment by Youst to him of fees (insignificant in amount) for his legal services. He received no salary and shared in no dividends or profits.

We assert flatly and emphatically that the record reveals no evidence, direct or circumstantial, that the petitioner entered into any plan or agreement to effect the transportation in interstate commerce of any woman or girl for the purpose of employing her to work for Palm Lake Development, Inc. We challenge counsel for the respondent to point to any such evidence in the record. There was no proof that the petitioner knew of any plan or purpose to effect any such transportation. There was not even any evidence that he was apprised of any need for seeking in other states for hostesses or entertainers for the La Paloma Club. Every fact and every circumstance relied on by the Government as evidence of the petitioner's guilt is thoroughly consistent with the hypothesis of his innocence.

At the conclusion of the Government's case in chief the petitioner moved (r. 458-462) the trial court to instruct the jury to return a verdict of acquittal. The motion was denied (r. 462). It was renewed (r. 653) at the conclusion of all of the evidence; and was again denied (r. 653).

The petitioner, before the jury's retirement, requested the trial court to give the jury several numbered instructions, among which were the following:

> "6. In this case some of the testimony relied upon by the government is from persons alleged in the indictment to have been accomplices of the defendant. As to such testimony the Court charges you that such testimony should be received with extreme caution."

"10. If you find from the evidence that the defendant, Fred Pine, had no knowledge of the transportation of the said women or girls, or some of them, or any intent that they or any of them were being, or would be so transported for the purpose alleged, it will be your duty to find for the defendant and your verdict should be 'not guilty.'"

"24. This is a case of what is known as circumstantial evidence, no witness having testified that he or she saw or heard the defendant conspiring, combining, confederating or agreeing together or with any other person or persons to commit any offense against the United States of America. The Government, therefore, as to the alleged conspiracy, combination, confederation or agreement, relies on circumstantial evidence solely. You are the sole and exclusive judges of the weight of the testimony and the evidence. Where the evidence is wholly circumstantial upon any material fact, the law is that while circumstantial evidence is capable of producing the highest degree of moral certainty, yet from its very nature it should have careful and patient consideration. The true test by which to determine the value of circumstantial evidence, in respect to its sufficiency to warrant a conviction in a criminal case, is not whether the proof establishes circumstances which are consistent or which coincide with the hypothesis or theory of the guilt of the accused, but whether the circumstances, satisfactorily established, are of a conclusive character and point so surely and unerringly to

the guilt of the accused as to exclude every reasonable hypothesis or theory of his innocence. The force of circumstantial evidence being exclusive in its character, the mere coincidence of a given number of circumstances with the hypothesis or theory of guilt, or the fact that such circumstances concur with, or render possible, the hypothesis or theory of the guilt of the accused, is not a reliable or admissible test, unless the circumstances arise to such a degree of cogency and force as in the order of natural cause and effect to exclude to a moral certainty every other hypothesis except the single one of guilt. The proof must not only coincide with the hypothesis of guilt, but it must be inconsistent with every other reasonable hypothesis."

"29. If the evidence convinces you to the exclusion of every reasonable doubt that the defendant Fred Pine and one or more of the persons named or referred to in the indictment as co-conspirators joined in a common purpose, design or understanding to effect or cause the transportation in interstate commerce of any of the women or girls named or referred to in the indictment for the purpose of employing them, or any of them, to work at the La Paloma Club, there will remain for your consideration and determination the question of whether the circumstances, surroundings and influences to which such employment would subject them were such as would tend to induce such women or girls, or any of them, to give themselves or herself up to a condition of debauchery which

eventually and naturally would lead them, or any of them, to a course of immorality sexually. Consequently, the maturity or immaturity and the experience or inexperience of such women or girls are material facts for your consideration."

The jury returned a verdict of guilty (r. 23). The petitioner's motion (r. 692-697) for a new trial was denied (r. 697) and he was adjudged guilty and sentenced to serve a term of two years' imprisonment and to pay a fine of $1,000 (r. 23-24).

The petitioner appealed (r. 24-25) to the United States Circuit Court of Appeals from the judgment of the district court.

Among the assignments of error relied on by the petitioner in the appellate court for a reversal of the trial court's judgment were the following: (a) The trial court erred in denying the petitioner's motion, made at the close of the Government's case in chief, and renewed at the conclusion of all of the evidence, for a directed verdict of not guilty; (b) the trial court erroneously refused to give the jury the instructions numbered 6, 10, 24 and 29 (quoted above) of the instructions requested by the petitioner; and (c) the trial court erred in denying the petitioner's motion for a new trial. The petitioner (in his brief) also directed the appellate court's attention to the pronounced, persistent and seriously prejudicial misconduct of the prosecuting attorneys reflected by the record and to the failure of the trial court to rebuke counsel for the Government, or to declare a mistrial, because of their misconduct of the case (although no assignment of error was predicated on such misconduct).

A remarkable incident occurred during the course of the oral argument of the case before the appellate court. The presiding judge several times asked the United States Attorney to point, if he could, to evidence in the record which showed that the petitioner had knowledge of any plan or purpose to effect the transportation in interstate commerce of the women and girls named in the indictment and in the bill of particulars. Pressed for an answer to the question from the bench, the United States Attorney **admitted** that the record reflected no such evidence. The admission (which was virtually a confession of error) concluded his argument. Not more than one-half of his allotted time had been consumed.

Nevertheless the judgment of conviction was affirmed (r. 722).

In its opinion (r. 712-721) the Circuit Court of Appeals held (a) that under the indictment (quoted above) it was not necessary to prove that the petitioner knew of, and became a party to, a conspiracy to effect the illegal transportation in interstate commerce of any of the women or girls named in the indictment and in the bill of particulars, but that it was proper and sufficient to show that he knew of, and became a party to, a general, comprehensive and continuing conspiracy to effect the illegal transportation in interstate commerce of women or girls whenever they should be needed or wanted as employees at the La Paloma Club (without having in contemplation the transportation of any specific woman or girl); and (b) that the evidence was sufficient to show that the petitioner knew of, and became a party to, such a general conspiracy.

We unhesitatingly and confidently assert, without disrespect, that the statement of the appellate court in its opinion that the record reflects evidence which warrants the conclusion that the petitioner knew of, and became a party to, such a general conspiracy is utterly unwarranted and baseless. We again challenge counsel for the Government to direct the Court's attention to any such evidence in the record. There was no more or better proof that the petitioner knew of any general, comprehensive and continuing plan or purpose to effect the future transportation and employment of women or girls whenever they should be needed or wanted than there was that he knew of any plan or purpose to effect the transportation and employment of the specific women and girls named in the indictment and in the bill of particulars.

The theory that it was not necessary to prove that the petitioner knew of, and became a party to, a conspiracy to effect the illegal transportation of any of the women or girls named in the indictment and in the bill of particulars, but that it was proper and sufficient to show that he knew of, and became a party to, a general, comprehensive and continuing conspiracy to effect the illegal transportation of women or girls whenever they should be needed or wanted (without having in contemplation the transportation of any specific woman or girl), is a theory which evidently was evolved by the appellate court. It was not advanced either in the brief filed in behalf of the Government or in the oral argument of the United States Attorney before the appellate court. Counsel for the petitioner have never been accorded the opportunity to submit their views (in opposition to such theory) fully and adequately by brief or oral argument.

In its opinion the appellate court held that the trial court's refusal to give the instruction numbered 6 (quoted above) was not reversible error because the charge was "couched in such general terms as to be misleading" and because "the judge charged fully on the weighing of evidence, and it was a matter within his discretion whether a charge as to accomplice testimony should be given."

The appellate court held that the trial court's refusal to give the instruction numbered 10 (quoted above) was not reversible error because "its effect was to charge as though the offense was the substantive one of actually transporting particular women and girls rather than the offense of conspiring to transport, and it was, therefore, confusing and incorrect."

The appellate court held that the instruction numbered 24 (quoted above) is a correct charge, but that the trial court's refusal to give it was not reversible error because "the court in the main charge did give a charge on circumstantial evidence correctly embodying the essentials of such charge."

The appellate court held that the trial court's refusal to give the instruction numbered 29 (quoted above) was not reversible error because "it was a wholly incorrect statement of the law."

The appellate court held that "the conduct of the prosecution did not constitute reversible error." The court said that "in view of the nature of the vigorous personal defense he [the petitioner] made and of the clash of personalities which was thus made inevitable,

it is plain that there was ample ground for anticipating, as well as basis for excusing, some by-play."

The misconduct of the prosecuting attorneys is again adverted to and discussed in the accompanying brief.

The petitioner sought a rehearing. His petition therefor (r. 723-735) was denied (r. 736).

He now seeks a review and determination of the cause by this Court and a reversal of the adverse judgment of the United States Circuit Court of Appeals for the Fifth Circuit.

STATEMENT OF STATUTORY BASIS FOR EXERCISE OF JURISDICTION

The statutory provisions which, it is believed, authorize the assumption and exercise of jurisdiction by this Court are the provisions of Section 347, Title 28, U. S. C. A.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

1. The opinion and decision of the Court in the case of Louis Athanasaw and Mitchell Sampson v. United States, 227 U. S. 326, 57 L. ed. 528, 33 S. C. 285, should be reconsidered; and the views expressed in such opinion should be receded from, or, at least, revised and clarified.

2. The decision of the United States Circuit Court of Appeals for the Fifth Circuit (because of its holding that, under an indictment wherein the petitioner was charged with having conspired with others to effect the

illegal transportation in interstate commerce of specific women and girls, it was proper and sufficient to show that he knew of, and became a party to, a general, comprehensive and continuing conspiracy to effect, at some indeterminate future time, the illegal transportation in interstate commerce of women or girls whenever they should be needed or wanted, without having in contemplation any specific woman or girl) is in conflict with the decision of the United States Circuit Court of Appeals for the Fourth Circuit, on the same matter, in the case of Rabens v. United States, 146 Fed. 978; and in conflict with the decision of the United States Circuit Court of Appeals for the Third Circuit, on the same matter, in the case of United States v. Wills, 36 Fed. (2d) 855.

3. In its decision the United States Circuit Court of Appeals for the Fifth Circuit (by its holding mentioned and referred to in the preceding paragraph numbered 2) has so far departed from the accepted and usual course of judicial proceedings, and has so far sanctioned such a departure by the trial court, as to call for the exercise by this Court of its power of supervision, because, under the indictment, as construed and interpreted by the said appellate court, and under the erroneous doctrine enunciated in such decision, a conviction would have been warranted if the proofs had shown either (a) that the petitioner committed the offense of conspiring with others to effect the illegal transportation in interstate commerce of any of the specific women and girls named in the indictment and in the bill of particulars or (b) that the petitioner committed the different offense of having entered into a general, comprehensive and continuing conspiracy to effect, at some future indeterminate time,

the illegal transportation in interstate commerce of women or girls whenever they should be needed or wanted, without having in contemplation any specific woman or girl; and because, as so construed and interpreted, the indictment is duplicitous and the petitioner was not sufficiently apprised, in conformity to the provisions of Article VI of the Amendments to the Federal Constitution, of the nature and cause of the accusation against him, and was denied due process of law and subjected to the danger of being twice put in jeopardy for the same offense in violation of the provisions of Article V of the Amendments to the Federal Constitution.

4. In its decision the United States Circuit Court of Appeals for the Fifth Circuit (by its holding that the evidence was sufficient to support the conclusion that the petitioner knew of, and became a party to, a general plan or conspiracy to transport women or girls unlawfully in interstate commerce) has so far departed from the accepted and usual course of judicial proceedings, and has so far sanctioned such a departure by the trial court, as to call for the exercise by this Court of its power of supervision, because such holding is arbitrary, unwarranted and utterly baseless (as an examination of the record will disclose).

5. The decision of the United States Circuit Court of Appeals for the Fifth Circuit (because of its holding that the trial court's refusal to give the instruction numbered 6, quoted above, of the instructions requested by the petitioner was not prejudicial and reversible error) is in conflict with the decision of the Court of Appeals of the District of Columbia, on the same matter, in the case of Freed v. United States, 266 Fed. 1012; and is

probably in conflict with the decisions of this Court, on the same matter, in the cases of Caminetti v. United States, 242 U. S. 470, 61 L. ed. 442, 37 S. C. 192, and Holmgren v. United States, 217 U. S. 509, 54 L. ed. 861, 30 S. C. 588.

6. In its decision the United States Circuit Court of Appeals for the Fifth Circuit (by its holding that the trial court's refusal to give the instruction numbered 10, quoted above, of the instructions requested by the petitioner was not prejudicial and reversible error) has so far departed from the accepted and usual course of judicial proceedings, and has so far sanctioned such a departure by the trial court, as to call for the exercise by this Court of its power of supervision, because in his general charge to the jury the trial judge did not, at any point, advise the jury in plain, simple and understandable language that the duty rested on the Government to prove guilty knowledge on the part of the petitioner of the alleged conspiracy, its objects and its purposes; and the petitioner, by requesting the giving of the instruction numbered 10, sought to have the trial judge instruct the jury in plain, simple and understandable language that if the petitioner had no knowledge of any plan or purpose to effect the illegal transportation in interstate commerce of women or girls he could not be guilty of conspiring to effect such transportation.

7. In its decision the United States Circuit Court of Appeals for the Fifth Circuit (by its holding that the trial court's refusal to give the instruction numbered 24, quoted above, of the instructions requested by the petitioner was not prejudicial and reversible error) has so far departed from the accepted and usual course of judi-

cial proceedings, and has so far sanctioned such a departure by the trial court, as to call for the exercise by this Court of its power of supervision, because the trial court's general charge as to circumstantial evidence was incomplete and inadequate and in giving it the trial court ignored certain important and well established legal principles which were embodied in the requested instruction, one of which is that "the true test by which to determine the value of circumstantial evidence, in respect to its sufficiency to warrant a conviction in a criminal case, is not whether the proof establishes circumstances which are consistent or which coincide with the hypothesis or theory of the guilt of the accused, but whether the circumstances, satisfactorily established, are of a conclusive character and point so surely and unerringly to the guilt of the accused as to exclude every reasonable hypothesis or theory of his innocence."

8. The decision of the United States Circuit Court of Appeals for the Fifth Circuit (because of its holding that the trial court's refusal to give the instruction numbered 29, quoted above, of the instructions requested by the petitioner was not prejudicial and reversible error) is in conflict with the decision of the United States Circuit Court of Appeals for the Seventh Circuit, on the same matter, in the case of United States v. Lewis, 110 Fed. (2d) 460.

9. The decision of the United States Circuit Court of Appeals for the Fifth Circuit (because of its holding that the pronounced, persistent and prejudicial misconduct of the prosecuting attorneys at and throughout the trial was excusable) is in conflict with the decisions of this Court, on the same matter, in the cases of Viereck v.

United States (decided March 1, 1943) and Berger v. United States, 295 U. S. 78, 79 L. ed. 1314, 55 S. C. 629.

THE QUESTIONS PRESENTED

The principal questions which are presented by the petition (and which are argued in the brief annexed) are:

1. Should not the opinion and decision of this Court in the case of Louis Athanasaw and Mitchell Sampson v. United States, 227 U. S. 326, 57 L. ed. 528, 33 S. C. 285 (wherein it apparently was held that it is violative of the Act of June 10, 1910, Section 397 et seq., Title 18, U. S. C. A., known as the White Slave Traffic Act, to procure or to aid the interstate transportation of a woman or girl for the purpose of employing her in such **surroundings** as would **tend** "to induce her to give herself up to a condition of debauchery which **eventually** and naturally **would lead her to** a course of immorality sexually"), be reconsidered and receded from, or, at least, revised and clarified, for the reasons that (a) by the provisions of the act, if it is to be so construed, the citizen is not informed with reasonable precision what conduct is prohibited so that he may have a certain ascertainable and understandable rule of conduct and may know what conduct it is his duty to avoid; (b) in each case where an indictment is sought, because of an alleged violation of the act as so construed, the grand jurors are licensed to create their own standards in determining whether the surroundings in question were such as **tended** to induce the woman or girl in question to give herself up to a condition of debauchery which **eventually** and naturally **would lead her to** a course of immorality sexually; (c) in each case where an indictment is returned, because of an

alleged violation of the act as so construed, the petit jurors are similarly licensed to create their own standards; (d) consequently the maturity or immaturity, the experience or inexperience and the sophistication or lack of sophistication of the woman or girl in question, as well as a number of other like factors, are material matters for the consideration of the grand and petit jurors; (e) such construction as apparently was given the act in the mentioned case is so vague, indefinite and uncertain that intelligent men are necessarily forced to guess as to its meaning and to honestly differ as to its application; and (f) such construction distorts the language of the act and is repugnant to, and violative of, the due process provisions of Articles V and VI of the Amendments to the Federal Constitution?

2. Where, at the trial of a defendant on an indictment wherein he was charged with having conspired with others to effect the illegal transportation in interstate commerce of specific women and girls for the purpose of employing them (in a night club) in such surroundings as would tend to induce them to give themselves up to a condition of debauchery which eventually and naturally would lead them to a course of immorality sexually, the Government failed to prove that the defendant knew of, and became a party to, any plan or agreement to effect the transportation of any of the specific women or girls named or referred to in the indictment, can his conviction be sustained even if the proofs showed that the defendant knew of, and became a party to, a general, comprehensive and continuing conspiracy to effect, at some indeterminate future time, the illegal transportation in interstate commerce of women or girls whenever they should be needed

or wanted, without having in contemplation any specific woman or girl?

3. If an indictment is so framed that under it a defendant may be convicted of either of two offenses (the offense of having conspired with others to effect the illegal transportation in interstate commerce of **specific** women and girls for the purpose of employing them in such surroundings as would tend to induce them to give themselves up to a condition of debauchery which eventually and naturally would lead them to a course of immorality sexually; or of the offense of having conspired with others to effect, at some indeterminate future time, the illegal transportation in interstate commerce of women and girls, whenever they should be needed or wanted, for the purpose of employing them in such surroundings, without having in contemplation the transportation of any **specific** woman or girl), or may be convicted of both of such offenses, should not the indictment be quashed, on timely and appropriate motion, because (a) it is duplicitous; (b) it does not sufficiently apprise the defendant, in conformity to the provisions of Article VI of the Amendments to the Federal Constitution, of the nature and cause of the accusation against him; and (c) the defendant, if prosecuted under such indictment, would be denied due process of law and subjected to the danger of being twice put in jeopardy for the same offense in violation of the provisions of Article V of the Amendments to the Federal Constitution?

4. Where, in a criminal case in which a defendant is charged with having conspired with others to effect the illegal transportation in interstate commerce of women and girls in violation of the provisions of the White Slave

Traffic Act, the evidence utterly fails to show that the defendant became a party to such conspiracy, and even fails to show that he had any knowledge of any plan or purpose to effect such transportation, is not the Supreme Court of the United States warranted in reversing a judgment of conviction, and should it not do so, when in timely and appropriate certiorari proceedings the insufficiency of the evidence is clearly and indisputably revealed by the record?

5. Where, in a prosecution for conspiring to effect the illegal transportation in interstate commerce of women and girls in violation of the White Slave Traffic Act, it is clearly and admittedly shown by the indictment and by the evidence that two Government witnesses, on whose testimony the Government mainly relies and without which the Government could not expect or hope to convict the accused, are co-conspirators and accomplices, is not the defendant entitled to a charge by which the jury shall be correctly instructed that "such testimony should be received with extreme caution"; and is not the refusal of the trial court to give such charge, or any charge of similar import, prejudicial and reversible error, particularly where there is grave and serious doubt as to the guilt of the accused and his testimony on every material point is in direct and sharp conflict with that of such witnesses?

6. In a prosecution for conspiring to effect the illegal transportation in interstate commerce of women and girls in violation of the White Slave Traffic Act, is not the defendant, who, in defense disclaims any knowledge of any plan or purpose to effect such transportation, entitled to a charge by which the jury shall be instructed in plain, simple, direct and understandable language that

if the accused had no knowledge of any plan or purpose to effect such transportation he could not be guilty of conspiring to effect such transportation; and is not the refusal of the trial court to give such charge, or any charge of similar import, prejudicial and reversible error, particularly where there is grave and serious doubt as to the guilt of the accused?

7. Where, in a prosecution for conspiracy to effect the illegal transportation in interstate commerce of women and girls in violation of the White Slave Traffic Act, the Government relies on circumstantial evidence solely (despite the fact that two of the defendant's alleged co-conspirators and accomplices testify willingly as Government witnesses, but are unable to give any direct or positive testimony that the accused knew of, and became a party to, the alleged conspiracy), is not the defendant entitled to a charge by which the jury shall be instructed that "the true test by which to determine the value of circumstantial evidence, in respect to its sufficiency to warrant a conviction in a criminal case, is not whether the proof establishes circumstances which are consistent or which coincide with the hypothesis or theory of the guilt of the accused, but whether the circumstances, satisfactorily established, are of a conclusive character and point so surely and unerringly to the guilt of the accused as to exclude every reasonable hypothesis or theory of his innocence"; and is not the refusal of the trial court to give such charge, or any charge in which the stated principle is clearly and adequately expressed, prejudicial and reversible error, particularly where there is grave and serious doubt as to the guilt of the accused?

8. In a prosecution for conspiring to effect the il-

legal transportation in interstate commerce of women and girls for the purpose of employing them in such surroundings as would tend to induce them to give themselves up to a condition of debauchery which eventually and naturally would lead them to a course of immorality sexually, are not the maturity or immaturity and the experience or inexperience of the women or girls (whose transportation it is alleged the defendant conspired to effect) material facts for the jury's consideration? And is not the accused entitled to a charge by which the jury shall be instructed that the maturity or immaturity and the experience or inexperience of such women and girls are material facts for the jury's consideration; and is not the trial court's refusal to give such charge prejudicial and reversible error, particularly where there arises from the evidence a grave and serious doubt as to whether the surroundings in question are such as would tend to induce the women and girls in question to give themselves up to a condition of debauchery which eventually and naturally would lead them to a course of immorality sexually?

9. Were not the bounds of propriety and fairness which should characterize the conduct of Government prosecuting attorneys in the prosecution of a criminal case overstepped in the instant case, to the prejudice of the petitioner, by the pronounced and persistent misconduct of the prosecuting attorneys in misstating facts in their examination of witnesses; in putting into the mouths of witnesses things which they had not said; in suggesting by their questions that statements had been made by witnesses which were not in fact made; by withholding important and material documentary evidence in the possession of the Government from the defendant; by insinuating that the original of a letter, an unsigned carbon

copy of which was introduced in evidence, had been signed by the defendant when they knew it had been signed by another person; by falsely representing to the trial court, in the jury's presence, that a material Government witness, who was under subpoena, was not available when in fact he was and by deliberately conveying to the jury the impression that the testimony of such witness would be favorable to the Government, but that the Government was deprived of such testimony because of the failure of the witness to remain in attendance; by purposely eliciting half-truths from witnesses and compelling the accused to assume the burden of eliciting the whole truth; by making numerous insinuations and assertions calculated to mislead the jury; in expressing in their cross-examination of the accused their personal and antagonistic views as to his character and conduct; by "bullying" and arguing with the accused during their cross-examination of him; and by engaging in other improper tactics and "strategy"? And should not the judgment of conviction be reversed because of such misconduct (although no assignment of error was predicated thereon), especially in view of the fact that the case was not strong and depended almost entirely on the testimony of alleged co-conspirators and accomplices?

REFERENCE TO RECORD

The petitioner presents to this Court, and files herewith as an exhibit hereto, a duly certified transcript of the entire record in the case, as the same appears in the United States Circuit Court of Appeals for the Fifth Circuit.

Respectfully submitted by

James M. Carson

James M. Carson

Vincent C. Giblin

Vincent C. Giblin

Counsel for the Petitioner.

June 21, 1943.